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Workers' Compensation

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WORKERS' COMPENSATION

by

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THE survey year included a session of the Texas Legislature, which enacted a number of changes of substance to the Workers' Compensation Act.[1] These new provisions are summarized in part III of this Article. As in the past, a significant number of the appellate cases handed down during the period were decided on grounds of legal and factual sufficiency of the evidence. These cases do not repay reading in the majority of instances. An earlier survey author noted the wisdom of the Amarillo court of appeals in holding such opinions at considerable distance.[2]

I. SUBSTANTIVE LAW

A. The Employment Relation: Borrowed Employees

The courts of appeals handed down only two significant decisions treating the employment relation during the survey period.[3] Both cases involved questions of borrowed, or colloquially, "loaned" employees. *Carr v. Carroll*[4] is a thorough and traditional treatment, in the context of a third party action, of an increasingly common phenomenon involving temporary employment services.

Austin Carr was an employee of Manpower, Inc., a supplier of temporary labor. On the day of the accident Manpower assigned him to work as a "general carrier" at the place of business of the Carroll Company. Carr spent the morning unloading trucks. He was injured when he fell from the front prong of a fork lift and was pinned under the machine. Manpower's carrier paid compensation. Carr sued Carroll for damages for the personal injury he sustained as a result of the negligence of Carroll's employees. Readers of compensation cases will observe that this case is an instance of

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1. TEX. REV. CIV. STAT. ANN. arts. 8306-8306a (Vernon 1967 & Supp. 1984).

2. Muldrow, *Workers' Compensation, Annual Survey of Texas Law*, 34 SW. L.J. 323, 355 (1980) (quoting International Ins. Co. v. Torres, 576 S.W.2d 862, 867 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.)): "We conclude that many cases can be cited pro and con on the question of the sufficiency of the evidence to sustain a jury finding of total and permanent disability. We respectfully refrain from undertaking the impossible task of attempting to reconcile all of these cases."

3. Two other cases dealt with highly specialized employment questions.

4. 646 S.W.2d 561 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).

the "upside-down" case where the employee argues against compensability in order to obtain the larger recovery available in a third party tort action, while the employer's liability carrier argues in favor of compensation in order to obtain the immunity that accompanies a finding of the employment relation.

A jury found that Carr was Carroll's borrowed employee at the time of the injury and that Carr and Carroll Company were each fifty percent negligent. On the strength of the first jury finding and proof that Carroll Company was a subscriber under the Workers' Compensation Act,[5] the trial court entered a take-nothing judgment against Carr. On appeal, the Dallas court of appeals affirmed use of the familiar "right of control" test explained by the supreme court in *Producers Chemical Co. v. McKay*.[6] The court rejected Carr's suggestion that the trial court should have instructed that "though an employee be loaned [sic] and subject to the direction of the temporary employer, no new employment relationship is established if in following the directions of the temporary employer Carr was doing so merely in obedience to his general employer."[7] The court instead found *Hilgenberg v. Elam*[8] controlling and stated that the test for determining whether one has become the employee of another is " 'whether in the performance of the wrongful *act* he continues liable to the direction and control of his general employer or becomes subject to that of the person to whom he is lent.' "[9] The court used this test, however, for a purpose for which it was not designed. *Hilgenberg* was a tort case, and the test it developed asks whether it is just for the special employer to be liable to a third party victim in tort. To use this test in a case where the plaintiff is the victim ignores the very real differences between the two types of suits and the differing policies that underlie tort law and compensation law.

The court placed some emphasis on whether the borrowed employee's acts were within the normal scope of the special employer's business, with the customary attention to the special employer's supervision of the details of the work.[10] The court rejected Carr's contention that the special issue as

5. TEX. REV. CIV. STAT. ANN. art. 8306 (Vernon 1967 & Supp. 1984).

6. 366 S.W.2d 220, 225-26 (Tex. 1963). The *McKay* court stated:

> Whether general employees of one employer have . . . become special or borrowed employees of another employer is often a difficult question . . . . Solution of the question rests in right of control of the manner in which the employees perform the services necessary to the accomplishment of their ultimate obligation. If the general employees of one employer are placed under control of another employer in the manner of performing their services, they become his special or borrowed employees. If the employees remain under control of their general employer in the manner of performing their services, they remain employees of the general employer and he is liable for the consequence of their negligence.

Id. at 225, *cited in Carr*, 646 S.W.2d at 563.

7. 646 S.W.2d at 563.

8. 145 Tex. 437, 198 S.W.2d 94 (1946).

9. 646 S.W.2d at 564 (quoting *Hilgenberg*, 145 Tex. at 441, 198 S.W.2d at 96) (emphasis supplied by *Carr* court).

10. 646 S.W.2d at 564.

to borrowed employee status should have required the jury to find that Carr had consented to or was charged with knowledge of the lending agreement.[11] It distinguished an earlier case,[12] which seemed to have so held. As a general proposition, the earlier opinion was probably correct, for if compensation is premised upon a statutory surrender of common law rights through the medium of the contractual employment relation,[13] then the employee should be aware of whose employment he has entered. Nonetheless, the court of appeals held that the instruction need not be given.[14] The court noted that in any event the record revealed that Carr was aware that his employer was a supplier of temporary labor and that Carroll Company was to supervise his performance.[15]

The court's line of reasoning in *Carr* could extend too far unless the policies of the Act are considered. The compensation scheme is designed to replace tort with compensation as between employer and employee as to employment-related injuries. Everything else is a gloss on this simple principle. In *Carr* it appeared that Carr's daily employment was by its very nature to work for *two* employers, and that therefore he had consensually forfeited his common law tort rights in favor of a statutory compensation remedy under article 8306, section 3(a).[16] Both employers would be liable in compensation, and contractual indemnity would ordinarily allocate ultimate financial responsibility between the two carriers.

Dickerson v. I.N.A. [17] also illustrates the difficulty in using tort precepts in compensation cases. Dickerson was an employee of the general employer, Barton. At the time of the accident that injured him, Dickerson was driving a truck leased from Barton to R.B. Goodloe, I.N.A.'s insured, who operated it under a permit from the Texas Railroad Commission. The lease, filed with the Texas Department of Public Safety as required by article 6701c—1[18] of the Texas statutes, provided: "Lessor . . . hereby gives lessee . . . full power, control, supervision, and use of the above described equipment . . . in the manner as though lessee owned same during the term of this lease."[19]

I.N.A. moved for summary judgment on the basis of Dickerson's deposition testimony that he was an employee of Barton and not of R.B. Goodloe. Dickerson contended, however, that he was an employee of R.B.

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11. *Id.*

12. Guerro v. Standard Alloys Mfg. Co., 566 S.W.2d 100 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.), *cited in Carr*, 646 S.W.2d at 564. In *Guerro* the general employer visited the job site several times to check on the employees and give instructions. In addition, the injured worker spoke only Spanish and the special employer did not speak Spanish. 566 S.W.2d at 102. Such close supervision did not occur in *Carr*. 646 S.W.2d at 564.

13. An employee of a subscriber is deemed to have waived his right of action at common law unless he gives the employer written notice he is claiming common law rights at the time of the contract of hire. TEX. REV. CIV. STAT. ANN. art 8306, § 3a (Vernon 1967).

14. 646 S.W.2d at 564-65.

15. *Id.* at 565.

16. TEX. REV. CIV. STAT. ANN. art 8306, § 3(a) (Vernon 1967).

17. 640 S.W.2d 81 (Tex. App.—Amarillo 1982, no writ).

18. TEX. REV. CIV. STAT. ANN. art. 6701c—1, § 2 (Vernon Supp. 1984).

19. 640 S.W.2d at 82.

Goodloe by virtue of article 6701c—1, section 2, and an earlier case that held that a Railroad Commission permit holder was not permitted to deny that it had the right to control the driver.[20] The trial court granted the carrier's motion for summary judgment and the court of appeals affirmed.[21] The court of appeals distinguished the precedent as addressing concerns of respondent superior rather than compensability. Public policy considerations differ where the driver is the active tortfeasor rather than himself the injured party. The court stated that article 6701c—1 " 'was obviously enacted to eliminate any uncertainty that might otherwise exist as to who is responsible for wrongs inflicted upon the public at large through the operation on our state highways by lessees of the vehicles named in the statute.' "[22] Thus the statute had nothing to do with the question of a driver's employee status under the Workers' Compensation Act. Because the statute did not affect his employee status, Dickerson's deposition testimony that he was Barton's employee was sufficient to support the summary judgment.[23]

B. Course of Employment

Five highly significant opinions were announced in the crucial area of course of employment, including one lengthy and problematic opinion by the Texas Supreme Court. A trend toward compensability may be discernible, especially in the area known as "going and coming."

Unexplained Death. The supreme court's 1981 decision in *Deatherage v. International Insurance Co*.[24] was thought by some commentators to have created a presumption that a fatal accident arose out of the course of employment unless evidence indicated that the decedent was not carrying out his employer's business at the time of his death.[25] During the survey year, the court made clear in *Walters v. American States Insurance Co*.[26] that this interpretation overstated its earlier holding. *Walters* established new guidelines for cases of unexplained death, or at least for death cases resulting from unexplained assaults.

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20. Greyhound Van Lines, Inc. v. Bellamy, 502 S.W.2d 586 (Tex. Civ. App.—Waco 1973, no writ). In *Greyhound* a third party sued Greyhound when the driver of a leased truck negligently started the truck, injuring the third party. The court rejected the lessee's argument that a lease giving Greyhound exclusive possession, control, and use of the truck did not include the right to supervise the driver's use of the truck. 502 S.W.2d at 588.

21. 640 S.W.2d at 84.

22. *Id*. (quoting *Greyhound*, 502 S.W.2d at 588).

23. 640 S.W.2d at 84.

24. 615 S.W.2d 181 (Tex. 1981) (jury could reasonably infer that night watchman who lived on premises of abandoned plant was performing a security duty for employer whenever he was on the premises, such that employee's death in unwitnessed fire that destroyed his trailer was the result of injuries received in the course of his employment), *on remand*, 628 S.W.2d 209 (Tex. App.—Austin 1982, no writ) (insufficient evidence that fire risk was reasonably incidental to employee's work). For a discussion of the case, see Collins & Ramon, *Workers' Compensation, Annual Survey of Texas Law*, 37 Sw. L.J. 239, 242-43 (1983).

25. T. FLAHIVE & R. OGDEN, TEXAS WORKERS' COMPENSATION MANUAL 112 (1982).

26. 654 S.W.2d 423 (Tex. 1983).

The employee in *Walters*, Ivan Michael Justice, was an interior designer for Richard Lamport & Associates, Inc. He and Lamport were found shot to death in a field near the Dallas-Fort Worth airport. The men had been shot in the back, apparently from a distance. There was evidence that Lamport had had an appointment at the airport and had asked Justice to accompany him. There was also evidence that an unknown customer had called Lamport repeatedly.

The trial court submitted a "simple special issue"[27] and definition to the jury:

> Do you find from a preponderance of the evidence that Ivan Michael Justice received his fatal injury in the course of his employment, as that term [is] defined in this charge . . . ?
>
> . . . .
>
> "Injury in the Course of Employment" as that term is used in this charge, means any injury having to do with and originating in the work, business, trade or profession of the employer, received by an employee while engaged in or about the furtherance of the affairs or business of his employer, whether upon the employer's premises or elsewhere.[28]

The jury returned an affirmative finding, but the court of appeals found "no evidence" supporting the finding and reversed.[29] In seeking reversal, the plaintiff argued that there was evidence to support the finding and that she was entitled to a presumption that Justice's death was employment-related. The supreme court, in an opinion by Chief Justice Pope, agreed that the evidence supported the finding, but characterized the presumption as unneeded.[30]

The difficulty in deriving the full meaning of the *Walters* opinion stems in part from the failure of the carrier's counsel, noted by the majority, to plead, prove, or obtain an issue on the statutory exclusion by article 8309, section 1, of injuries resulting from purely personal assault.[31] The court stated:

> The jury was not instructed and there was no way for the jury to know that there was a statute that declared Justice was not an employee if his death was caused by an "act of a third person intended to injure him and not directed against him as an employee, or because of his employment." Tex. Rev. Civ. Stat. Ann. art. 8309, § 1. Nobody requested such an instruction. The jury's function was to answer the [single simple] issue. They did that and we should not charge them with knowledge of a statute about which they knew nothing.[32]

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27. *Id.* at 425.

28. *Id.*

29. American States Ins. Co. v. Walters, 636 S.W.2d 794, 797 (Tex. App.—Tyler 1982).

30. 654 S.W.2d at 425.

31. TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (Vernon 1967) provides that injury in the course of employment does not include "[a]n injury caused by an act of a third person intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment."

32. 654 S.W.2d at 427.

Walters seems to hold that in the total absence of proof that the deaths resulted from a purely personal assault, it was a permissible inference from facts similar to the ones in *Deatherage* that the employee's fatal injury occurred in the course of his employment.[33] As the concurring justices observed, however, the majority's "permissible inference" went a great deal farther than the facts *Deatherage* required, too far perhaps. The concurrence in *Walters* observed that it was a reasonable inference

> that Justice was engaged in and about the furtherance of Lamport's business; i.e., that Justice received his fatal injuries during the hours of his employment and was at a place where he might have properly been. . . .
>
> This does not end our inquiry, however. There must also be evidence that Justice's injury was *of a kind and character* that originated in Lamport's business; *i.e.*, that Justice was not killed for personal reasons.[34]

In this case, the concurring opinion persuasively asserted, the inference was too great. That two men were killed on a business trip in no way demonstrated that the actual source of the injury was employment-related. The majority met this objection with references to Larson's positional risk doctrine,[35] as if that doctrine made the inference itself more permissible. Of course, the Larson theory supports the inference, but only in a limited appellate sense. "No evidence" reversals on similar facts will now be fewer. Larson apparently intended only to shift the "neutral risk" of unexplained death to the employer where proof of course of employment existed. In most jurisdictions course of employment is an administrative finding; the jury finding overlay is peculiar to Texas. A presumption, as suggested by the concurrence, that an employee's death by assault occurring at the time and place of employment was work-related would be logical, helpful, and consistent with Larson's positional risk theory.

Travel and Going and Coming. Four cases within the survey period treated the "geometric" aspects of course of employment, and three of those dealt with variations on the going and coming rule. As a starting point, the general rule is that the benefits of the workers' compensation statute do not apply to injuries one receives while traveling to and from work.[36] Texas adds a statutory dimension to this general proposition, incorporating it into article 8309, section 1b of the Act.[37] Thus, as the supreme court held

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33. *Id.* at 426-27.

34. *Id.* at 429-30 (McGee, J., concurring) (emphasis added).

35. 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 11.33 (1982), *cited in Walters*, 654 S.W.2d at 426. The doctrine states that if an assault occurs for which no explanation exists and no evidence connects it to the employee privately, then the claimant should receive compensation if he was exposed to the assault because he was discharging his duties. 1 A. LARSON, *supra*, § 11.33.

36. Standard Fire Ins. Co. v. Rodriquez, 645 S.W.2d 534, 538 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); *see infra* notes 44-46 (discussion of case).

37. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967) provides:

> Unless transportation is furnished as a part of the contract of employment or is paid for by the employer, or unless the means of such transportation are

in *Texas General Indemnity Co. v. Bottom*,[38] it is necessary to demonstrate that the injury was of a kind and character that had to do with and originated in the work of the employer, that the injuries were received while the employee was furthering the business of the employer, and that transportation was furnished as a part of the employment or paid for or controlled by the employer or that the employee was directed to travel from one place to another by the employer.[39]

United States Fire Insurance Co. v. Brown[40] illustrates the interplay of these requirements. The court in *Brown* affirmed a summary judgment for the widow and surviving daughter of a registered nurse killed en route to a hospital assignment. The decedent was employed by Homemakers of Waco, a provider of health care personnel to hospitals, and routinely worked assignments in four to six hospitals in several towns and cities. Nurses placed by Homemakers were not required to report in to Homemakers but traveled directly to their assignments. Homemakers charged the client hospitals twenty-four cents per mile for employee travel and reimbursed the employee twenty cents per mile. The court of appeals found all the elements of recovery conclusively established, relying specifically on the reimbursement for transportation and on the fact that the employee was "directed in his employment to proceed from one place to another."[41] The court rejected the going and coming rule sub silentio in such a case, stating that applying the rule here "would be wholly unjust to salesmen, servicemen, repairmen, deliverymen, and a host of others who may be required to use their own automobiles in their work, and would be a strict rather than a liberal interpretation of the Workmen's Compensation Act."[42] The court distinguished Brown's work situation from that of the ordinary employee who travels each day to a specific location.[43]

Standard Fire Insurance Co. v. Rodriguez[44] contains a thorough discussion of the going and coming rule and a notable exception to it called the access doctrine. The access doctrine provides that when the employer "has

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under the control of the employer, or unless the employee is directed in his employment to proceed from one place to another place, such transportation shall not be the basis for claim that an injury occurring during the course of such transportation is sustained in the course of employment. Travel by an employee in the furtherance of the affairs or business of his employer shall not be the basis for a claim that an injury occurring during the course of such travel is sustained in the course of employment, if said travel is also in furtherance of personal or private affairs of the employee, unless the trip to the place of occurrence of said injury would have been made even had there been no personal or private affairs of the employee to be furthered by said trip, and unless said trip would not have been made had there been no affairs or business of the employer to be furthered by said trip.

38. 365 S.W.2d 350 (Tex. 1963).

39. *Id.* at 352-54; *see also* Liberty Mut. Ins. Co. v. Chestnut, 539 S.W.2d 924, 926 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.) (injury compensable under Act where employer paid employee per mile for travel to and from jobsite; citing *Bottom*).

40. 654 S.W.2d 566 (Tex. App.—Waco 1983).

41. *Id.* at 568.

42. *Id.* at 568-69.

43. *Id.*

44. 645 S.W.2d 534 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

evidenced an intention that the particular access route or area be used by the employee in going to and from work, and where such access route or area is so closely related to the employer's premises as to be fairly treated as a part of the premises, the general rule does not apply."[45]

In *Rodriguez* a seamstress employed on third floor premises was injured when she fell on metal stairs descending from a ground floor loading dock extension while leaving her work. Employees habitually, but not necessarily or exclusively, used the loading dock as an access route to the third floor place of employment. Together with other evidence of proximity and employer and employee use, the court of appeals found this evidence both legally and factually sufficient to support the jury's findings that the claimant was within the course and scope of her employment at the time of her injuries.[46]

A variation on the going and coming rule is the rule of *Marks v. Gray*[47] developed by Cardozo to deal with cases in which travel is motivated in part by business reasons and in part by personal reasons. This rule, which exists in statutory form in Texas,[48] entered the court's decision in *American States Insurance Co. v. Caddell*,[49] although the court's use of the rule unnecessarily complicated a routine case. In *Caddell* the decedent, a businessman, was directed by an apparently controlling shareholder having supervisory authority over him to travel to Waco to obtain plans. There was some evidence that Caddell in fact went to Waco. He died later in the afternoon in an automobile collision on a route whose path was not only a direct route from his office to his home but also a direct route from Waco to his home. The court began a coming and going analysis and mentioned the conditions under which injury occurring during travel is compensable under article 8309, sections 1 and 1b.[50] After leapfrogging over the provision allowing a finding of course of employment "when the employee is directed in his employment to proceed from one place to another place,"[51] the court undertook a dual purpose analysis under section 1b and *Marks v. Gray*. This dual purpose or "mixed motive" analysis was unnecessary since, as the court observed, "there is no evidence that the trip was made for reasons other than business, there being no evidence or indication that decedent's trip to Waco and back was for any personal or private motive."[52] The court therefore affirmed the trial court on the basis of no evidence. A simpler "going and coming" analysis would have provided the same result.

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45. *Id.* at 538 (citing Texas Compensation Ins. Co. v. Matthews, 519 S.W.2d 630, 631 (Tex. 1974)).

46. 645 S.W.2d at 536.

47. 251 N.Y. 90, 167 N.E. 181, 183 (1929).

48. TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967); *see supra* note 37 (text of statute).

49. 644 S.W.2d 884 (Tex. App.—Tyler 1982, no writ).

50. *Id.* at 885-87.

51. *Id.* at 887 (citing TEX. REV. CIV. STAT. ANN. art. 8309, § 1b (Vernon 1967)).

52. 644 S.W.2d at 887.

Off-Duty Peace Officer. In what it termed a case of first impression, the Dallas court of appeals in *Vernon v. City of Dallas*[53] affirmed a summary judgment against an off-duty police officer who was injured in an altercation outside of the city that employed him. The court held that even on the "scant evidence" in the summary judgment record, it was established as a matter of law that Officer Vernon did not receive his injury while acting as an employee in the course and scope of his employment.[54] The court relied heavily on a "jurisdictional" analysis, drawn from both the Texas Code of Criminal Procedure and the Code of Conduct of the Dallas Police Department, to define the course of his employment for workers' compensation purposes by his jurisdiction as a peace officer, which the court found to be the city of Dallas.[55] The court rejected without citation authorities from other jurisdictions that may suggest broader tests of course of employment for peace officers.[56] The court also refused to overturn the summary judgment merely on the ground that the plaintiff was on call twenty-four hours a day.[57] The court noted the requirement of *Thomas v. Travelers Insurance Co*.[58] that even an employee who is on call twenty-four hours a day must make "the additional showing that he was injured while engaged in or about the furtherance of his employer's business or affairs."[59] One wonders how much the court's opinion was influenced by the qualms that moved it to add a footnote stating: "Plaintiff has maintained in the trial court and here that he was acting to 'subdue an offender' or to 'end the disturbance.' This characterization is central to his argument. . . . Nothing in the record, except plaintiff's bare assertion, supports such a characterization."[60]

C. *Occupational Disease*

Only two opinions appeared during the survey period concerning occupational disease. In *Home Insurance Co. v. Davis*[61] the court of appeals found the evidence factually insufficient to support a jury finding that claimant Davis contracted chronic bronchitis as an occupational disease.[62] As with all factual and legal insufficiency cases, there is some hazard in extrapolating beyond the evidence before the appellate court. It is useful, nonetheless, to note the court's statement of the claimant's burden in an occupational disease case. The claimant must produce "probative evidence of a causal connection between the claimant's work and the disease, i.e., the disease must be indigenous to the work, or must be present in an

53. 638 S.W.2d 5 (Tex. App.—Dallas 1982, writ ref'd n.r.e.).
54. *Id*. at 8.
55. *Id*. at 7-8 (citing TEX. CODE CRIM. PROC. ANN. arts. 6.05, 6.06 (Vernon Supp. 1984) (referring to peace officer's county)).
56. 638 S.W.2d at 7-8.
57. *Id*.
58. 423 S.W.2d 359 (Tex. Civ. App.—El Paso 1967, writ ref'd).
59. 638 S.W.2d at 9-10.
60. *Id*. at 7.
61. 642 S.W.2d 268 (Tex. App.—Texarkana 1982, no writ).
62. *Id*. at 269.

increased degree in that work as compared with employment generally."[63] The claimant must also show the injury did not result from "[a]ggravation, acceleration, or excitement of a non-occupational disease."[64]

In the other occupational disease opinion, *Scott v. Houston Independent School District*,[65] the court found no reversible error in the trial court's refusal to include definitions of "harm" and "damages" in the jury charge in addition to the definition of "injury."[66] The appeals court held that "harm" and "damage" are not legal or technical terms but rather words to be given their ordinary connotation or natural construction.[67] The claimant, a Houston school teacher, was hospitalized under the care of a psychiatrist for neurasthenia or, specifically, anxiety neuroses. She based her right to recovery upon the 1971 amendments to the Workers' Compensation Act, which added "repetitious physical trauma" to the occupational disease statute.[68] The supreme court had previously held, however, in *Transportation Insurance Co. v. Maksyn*[69] that the amended statute excludes injury by repeated mental trauma. The plaintiff's definition of "harm,"[70] which the trial and appellate court rejected, arguably would have broadened or permitted juries to broaden the definition of "injury" beyond what the occupational disease statute and the court in *Maksyn* intended.

D. Medical Provider's Cause of Action

The supreme court in *Smith v. Stephenson*[71] faced the competing economic interests of the unpaid health care provider and the injured claimant during the pendency of a workers' compensation claim before the Industrial Accident Board and the courts. In *Smith* a chiropractor sued his patient on a sworn account for his fee for services rendered in connection with an injury that the chiropractor knew to be the subject of a compensation claim. The chiropractor had sent fee statements to the board, but when a dispute arose before the board as to the amount of the fee he withdrew his claim from the Board and sued the patient. He received a judgment from the trial court, which the court of appeals affirmed.[72] The supreme court reversed, holding that until the board processes a claim and determines reimbursement for or payment of the employee's medical expenses, the health care provider may not pursue a private claim against the

63. *Id.*
64. *Id.*
65. 641 S.W.2d 255 (Tex. App.—Houston [14th Dist.] 1982, no writ).
66. *Id.* at 257. The court took its definition of "injury" from 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 20.01 (1970).
67. 641 S.W.2d at 258.
68. TEX. REV. CIV. STAT. ANN. art 8306, § 20 (Vernon Supp. 1984).
69. 580 S.W.2d 334, 338 (Tex. 1979).
70. The plaintiff requested the following definition: " 'Harm' with reference to a living, active structure—as the body is—means essentially that the structure no longer functions as it should."
71. 641 S.W.2d 900 (Tex. 1982).
72. 624 S.W.2d 324, 328 (Tex. App.—Waco 1981).

employee.[73] The court stated, "Allowing the provider the right to file suit prior to final determination by the Board, or by the courts if the board award is appealed, would circumvent the principal purpose of the Act, to protect the employee."[74] Commenting on the adequacy of the statutory protection for the provider, the court noted with approval Larson's statement of the general rule that "if it turns out that the claim was not compensable, and that the employee is to be ultimately liable for the fees, the physician or hospital has been protected by a holding that the statute of limitations is tolled during the pendency of the claim."[75]

II. PROCEDURAL LAW

A. Exclusivity of Remedy

The supreme court wrote an intriguing but not definitive opinion in the difficult area of exclusivity of remedy in *Massey v. Armco Steel Co.*[76] The Industrial Accident Board awarded Massey total and permanent compensation and the insurer, American General, appealed to the district court. Massey answered and counterclaimed, alleging three causes of action, which the court defined ambiguously. The first cause of action was Massey's right to recover against the insurer under the workers' compensation policy. The court stated:

> In his second and third causes of action Massey joined Armco [and its agents] Lambright and Sansing [American General's employee] claiming that they conspired to interfere with the settlement of his compensation claim. Massey alleged a breach of the duty of good faith and fair dealing owed under the contract of insurance and sought damages for the intentional infliction of emotional distress.[77]

The trial court granted summary judgment against the employee, and the court of appeals affirmed on the ground that a workers' compensation award was the employee's exclusive remedy.[78] The supreme court reversed and remanded on a technical point,[79] leaving several questions subject to continuing doubt. The court observed that while the Act bars an employee's common law action for negligence against his employer, the employee retains a cause of action for intentional torts.[80] This right of action for intentional tort, however, is alternative to and mutually exclu-

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73. 641 S.W.2d at 903.

74. *Id.*

75. *Id.* (quoting 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.12(k), at 10-720 (1981)). The 1981 edition of this treatise is no longer in print. The cited passage appears in 1 A. LARSON, *supra* note 35, § 61.12(*l*), at 10-721.

76. 652 S.W.2d 932 (Tex. 1983).

77. *Id.* at 933.

78. 635 S.W.2d 596, 598 (Tex. App.—Houston [14th Dist.] 1982), *rev'd*, 652 S.W.2d 932 (Tex. 1983).

79. Massey failed to state a cause of action for civil conspiracy. *See infra* notes 83-84 and accompanying text.

80. 652 S.W.2d at 933 (citing Reed Tool Co. v. Copelin, 610 S.W.2d 736, 739 (Tex. 1980)).

sive of a right to recover benefits under the Act.[81] An employee who collects benefits under the Act for intentional injury has thus elected his remedy and is estopped from later seeking damages.

Significantly, the supreme court agreed with the injured employee that an employee may have one claim against his employer under the Act and another claim at common law for intentional tort. "Since such claims are mutually exclusive, however, the employer's intentional act must be separable from the compensation claim and must produce an independent injury."[82]

The court then examined Massey's pleadings to see if he had alleged an intentional tort independent of the original claim for which the board had awarded benefits. It found that he had not alleged such a tort, because his intentional counts sounded in conspiracy and his allegation of conspiracy was insufficient as a matter of law.[83] The court stated:

> For liability to attach, there must be an unlawful, overt act in furtherance of the conspiracy. The only overt acts alleged by Massey are the veto of his proposed settlements and the appeal from the award of the Industrial Accident Board. Since the rejection of settlement proposals is not an unlawful act, Massey has not stated a cause of action for civil conspiracy.[84]

The court reversed the summary judgment, nonetheless, on the basis of its well-known holding in *Texas Department of Corrections v. Herring*[85] that a plaintiff must have an opportunity to amend a pleading that fails to state a cause of action and that a special exception, not a motion for summary judgment, is the appropriate device to attack substantively deficient pleadings.[86] As the court stated in *Herring*, the "protective features of special exception procedure should not be circumvented by a motion for summary judgment . . . ."[87] What this admonishment means is that a claimant in Massey's position must be permitted to replead some other intentional tort unrelated to the compensation claim. The court at one point suggested that such claims should be limited to common law intentional torts,[88] but did not expressly impose this limitation. The supreme court thus left this important gray area of settlement practices concerning compensation claims for resolution in other cases.

In one such case a court of appeals attempted to define this gray area. In *St. Paul Insurance Co. v. McPeak*[89] claimant McPeak brought his claim to the Industrial Accident Board and ultimately to the district court when the insurer discontinued his benefits. In the district court he joined with his action for workers' compensation benefits an action for damages under

81. 652 S.W.2d at 933.
82. *Id.*
83. *Id.*
84. *Id.* at 934.
85. 513 S.W.2d 6 (Tex. 1974).
86. *Id.* at 10.
87. *Id.*
88. 652 S.W.2d at 933.
89. 641 S.W.2d 284 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

article 21.21 of the Insurance Code.[90] On its first hearing of the case the court of appeals in its opinion and judgment made clear that the exclusive remedy provision of the Workers' Compensation Act precluded recovery under the Insurance Code, because it would "tip the balance" that the Act had struck between employees' rights and employers' obligations.[91] To hold otherwise, the court reasoned, would thwart the clear intent of the legislature to limit the employee's recovery, and any deviation from that limitation would threaten the public policy underlying the Act.[92]

After listing a number of reasons why the trial court erred in trebling as damages the benefits McPeak obtained in the compensation portion of the trial,[93] the court squarely held that article 21.21 does not apply to a cause of action under the Workers' Compensation Act.[94] The court emphasized the narrowness of its holding by stating what it had not held:

> We are not to be read as holding that a cause of action for bad faith settlement or other unfair insurance practices can never be brought against a compensation carrier. . . . We also do not address whether Article 21.21 applies to unfair claims or bad faith settlement practices, or whether the violations claimed by appellant could be otherwise legally actionable. We simply hold the statutory *remedies* provided under Article 21.21 do not apply to actions brought *under* the provisions of the Workers' Compensation Act, and that the trial court erred in trebling the disability award.[95]

On rehearing, the court determined that the trial court should have severed the Insurance Code claims from the compensation claims as authorized by rule 174(b) of the Texas Rules of Civil Procedure.[96] It then rendered on the workers' compensation claim, affirming the claimant's judgment, and reversed and remanded for a separate trial on the Insurance Code claim.[97]

A case of less potential influence in the realm of exclusivity of remedy is *Davis v. Houston Independent School District*,[98] decided by the same court of appeals that decided *Massey* and *McPeak*. In *Davis* the plaintiff, a school teacher, was injured in attempting to quell a disturbance between two students. She filed for and received compensation benefits. Later she sued her employer for recovery of "assault benefits" provided for in the

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90. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981) provides that a person injured by the unfair or deceptive acts or practices of a company engaged in the insurance business may sue the company.

91. 641 S.W.2d at 286.

92. *Id.*

93. *Id.* at 287-88. Article 21.21 of the Insurance Code provides for treble damages as well as injunctive relief. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981).

94. 641 S.W.2d at 288.

95. *Id.* (emphasis added).

96. *Id.* at 289. Rule 174(b) states: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues." TEX. R. CIV. P. 174(b).

97. 641 S.W.2d at 289.

98. 654 S.W.2d 818 (Tex. App.—Houston [14th Dist.] 1983, no writ).

school district's manual of administrative procedure. The assault policy covered "unprovoked assaults" and left "injuries resulting from accidents" to workers' compensation. The court held that the record contained no conclusive proof of an election between mutually exclusive remedies or that the same episode could not be construed as both an accident under the workers' compensation law and an unprovoked assault under the contractual policy.[99] The court therefore was unable to say that plaintiff was estopped as a matter of law to assert the action under the assault policy.

On a subsidiary point, the court held that sovereign immunity for tort did not protect the school district from suits for breach of contract, although sovereign immunity would shield it from the plaintiff's claim for tortious interference with contractual advantage.[100] On the exclusivity of remedy point, the court ruled in plaintiff's favor. The court stated, "appellees have not demonstrated how the provisions of the workers' compensation law works [sic] to preclude an employee's recovery for breach of *contract* of employment; or how the contract in question provides that the employee's exclusive remedy lies with workers' compensation."[101]

B. Notice Requirements and Limitations

Notice of Injury and Filing of Claim. In *Martinez v. Home Indemnity Co*.[102] the Fort Worth court of appeals followed an earlier holding of the Beaumont court of appeals[103] that the first clause of article 8307, section 4a, which states "unless the Association or subscriber have notice of the injury,"[104] conditions only the requirement of formal notice of injury, not the six-month period of limitation on the filing of a claim.[105] Thus, actual knowledge by the employer or insurer does not toll the six-month limitation period.[106] Moreover, the court rejected the claimant's contention that she was entitled to the medical benefits incident to the injury even though her weekly indemnity benefits were barred. The claimant premised her

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99. *Id.* at 821.

100. *Id.*

101. *Id.* at 822 (emphasis in original).

102. 647 S.W.2d 102 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

103. Camarillo v. Highlands Underwriters Ins. Co., 625 S.W.2d 11, 12 (Tex. App.—Beaumont 1981, no writ).

104. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon 1967) provides:

> Unless the Association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the Association or subscriber within thirty (30) days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of the injury or of the first distinct manifestation of an occupational disease; or, in case of death of the employee or in the event of his physical or mental incapacity, within six (6) months after death or the removal of such physical or mental incapacity. For good cause the board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board.

105. 647 S.W.2d at 104.

106. *Id.* The statute of limitations for filing of claims has since been extended to one year. *See infra* note 197 and accompanying text.

argument on two cases seeming to hold that the only notice required to entitle a claimant to medical expenses is the notice of injury.[107] Consistently with its holding as to wage benefits, the court held that what is true of notice is not necessarily true of limitations.[108] The court relied upon *Texas Casualty Insurance Co. v. Beasley*,[109] which held that a claim for medical expenses merges with a claim for compensation and is barred with it.

Houston General Insurance Co. v. Vera[110] arose on an arguably erroneous instruction. The court asked the jury "whether notice was given and the claim filed within the specified time periods *after disability resulted*."[111] The critical event under the statute, however, is "injury or the first distinct manifestation of an occupational disease."[112] The court of appeals held the carrier had waived the error under rule 274 by failing to object to the issue at trial.[113] It refused to treat the submission as fundamental error, on the authority of *De Anda v. Home Insurance Co.*,[114] in which the supreme court had tacitly allowed such a submission to stand.[115] On a no evidence or insufficient evidence point, the court decided that the record contained evidence that the foreman had actual knowledge of the injury and stated that such knowledge met the statutory requirement.[116]

Notice of Intent to Appeal. The supreme court took a strict view of the twenty-day requirement for filing of the notice of intent to appeal[117] in *American General Fire & Casualty Co. v. Weinberg*.[118] The claimant filed two notices, one in Austin on July 17, and a copy of the first in Dallas on August 1. The claimant apparently filed the second copy in Dallas because he became worried that the Austin filing was ineffective since, although he had received his certified mail return receipt, he had not yet heard from the board. On August 2 the board notified him of receipt of his first notice. He filed suit fifteen days later on August 17, more than twenty days after the filing of his first notice of intent to appeal. The carrier filed an unsworn general denial and moved for summary judgment, which the trial court granted. The court of appeals reversed on unassigned error. The carrier, by failing to enter the verified denial required under rule

107. Standard Fire Ins. Co. v. Ratcliff, 537 S.W.2d 355, 358 (Tex. Civ. App.—Waco 1976, no writ); Standard Fire Ins. Co. v. Simon, 474 S.W.2d 530, 532 (Tex. Civ. App.—Dallas 1971, no writ).

108. 647 S.W.2d at 105.

109. 391 S.W.2d 33, 40 (Tex. 1965) (on motion for rehearing), *cited in Martinez*, 647 S.W.2d at 105.

110. 638 S.W.2d 102 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.).

111. *Id.* at 105 (emphasis in original).

112. TEX. REV. CIV. STAT. ANN. art. 8307, § 4a (Vernon 1967).

113. 638 S.W.2d at 105 (citing TEX. R. CIV. P. 274).

114. 618 S.W.2d 529, 533 n.4 (Tex. 1980).

115. 638 S.W.2d at 106.

116. *Id.*

117. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1984) provides that any interested party not willing to abide by the final decision of the board must file a notice with the board within 20 days of the final decision and must file suit within 20 days of giving the notice.

118. 639 S.W.2d 688 (Tex. 1982).

93(n), had forfeited the right to challenge late filing.[119] The court accordingly presumed the filing to have been timely, making summary judgment inappropriate.[120]

The supreme court reversed, describing its holding inartfully as resting upon "fundamental error."[121] According to the court, the court of appeals should not have reversed the trial court's judgment on a point neither party assigned as error.[122] The court affirmed the summary judgment on the ground of the claimant's failure to sue within twenty days of filing his first notice.[123] A more appropriate basis for reversal would have been the court's opinion in *City of Houston v. Clear Creek Basin Authority*,[124] mandating that objections to the entry of summary judgment be presented to the trial court. The high court was also on shaky ground when it tried to distinguish *American Employers Insurance Co. v. Scott*,[125] which held the date of a second notice filed in Austin to be dispositive. Because a board rule permits only Austin filings,[126] the court in *Weinberg* held that only the Austin filing could satisfy the notice requirement.[127]

Dual Requirement: Filing and Prosecution. Two cases that reached the courts of appeals involved the following dual requirement of article 8307, section 5: "If any party to such final ruling and decision of the Board, after having given notice as above provided, fails within said twenty (20) days to institute and prosecute a suit to set the same aside, then said final ruling and decision shall be binding . . . ."[128] Both courts[129] relied upon *Wilborn v. Texas Employers' Insurance Association*,[130] which reaffirmed the rule that the dual requirement of both instituting and prosecuting a suit is satisfied when a claimant files a petition within twenty days with a bona fide intent that citation shall issue and be served at once or that waiver of citation will be obtained and filed at once. In one of this year's cases, *Herrera v. Texas Employers' Insurance Association*,[131] satisfaction of the requirement was established as a matter of law, as it was in *Wilborn*,[132] by a showing that the carrier had attempted service upon the claimant and

119. Weinberg v. American Gen. Fire & Cas. Co., 626 S.W.2d 555 (Tex. App.—Texarkana 1981) (citing TEX. R. CIV. P. 93(n)).

120. 626 S.W.2d at 557.

121. The supreme court stated: "The Court of Appeals, obviously, considered this not only to be error, but fundamental error requiring a reversal. Fundamental error has become a rarity." 639 S.W.2d at 689.

122. *Id.*

123. *Id.*

124. 589 S.W.2d 671, 675 (Tex. 1979).

125. 33 S.W.2d 845, 846 (Tex. Civ. App.—Eastland 1930, writ ref'd).

126. Industrial Accident Bd., Rule 061.01.00.030, 2 Tex. Reg. 4315 (1977).

127. 639 S.W.2d at 689.

128. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1984).

129. Williams v. Texas Employers' Ins. Ass'n, 653 S.W.2d 377, 378 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.); Herrera v. Texas Employers' Ins. Ass'n, 653 S.W.2d 359, 360 (Tex. App.—San Antonio 1983, no writ).

130. 558 S.W.2d 65, 67 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

131. 653 S.W.2d 359 (Tex. App.—San Antonio 1983, no writ).

132. 558 S.W.2d at 67.

that such service had failed through no fault of the carrier, but rather because of the claimant's absence.[133]

Limitations on Death Actions. Merritt v. Texas Employers' Insurance Association[134] said more about summary judgment practice than about workers' compensation law. The court in *Merritt* reversed a summary judgment against a widow who initiated her claim for death benefits more than six months after her husband's death. The reason for the reversal, the court announced, was the failure of the summary judgment movant to establish its entitlement to judgment as a matter of law, because a death benefits claim becomes barred six months after death, not after injury, as the carrier had asserted in its motion.[135] It appeared that the court may have used this technical ground to set aside the summary judgment in order to allow the claimant's counsel to interpose the apparently available defense to limitations that the decedent's employer did not file his E-1 report of injury until after the six-month period for filing for death benefits.[136]

C. *Pleading and Special Issues*

Affirmative Defenses. In but another warning of the waning utility of the general denial, the supreme court in *France v. American Indemnity Co.*[137] reversed a take-nothing judgment against the claimant. France, a carpenter, injured his shoulder in 1975 while in the employ of American Indemnity's insured. In May 1977, while the claim arising out of the 1975 injury was still pending, France reinjured his shoulder while lying in bed. His physician advised him to undergo surgery but he chose not to do so. In September he entered into a subsequently-approved compromise settlement agreement, whereby American Indemnity agreed to pay all future medical benefits arising from the 1975 injury that France incurred prior to March 30, 1978. On December 27, 1977, France suffered a third injury to the shoulder while in the employ of Redford, a subcontractor under Home Indemnity's insured. France then informed American Indemnity of his desire to undergo surgery as previously advised, and American Indemnity authorized the surgery. American Indemnity refused to pay for the surgery, however, when it learned that the precipitating dislocation occurred while France was working on the Redford job. American Indemnity's adjuster suggested that France claim against Home Indemnity, his December employer's carrier. France did so, but Home Indemnity denied liability on the ground that France's employer, Redford, was a subcontractor of its insured and that its coverage did not extend to Redford's employees. France filed suit against American Indemnity on the settlement agreement and received a favorable jury verdict. Nonetheless, the trial court held

133. *Herrera*, 653 S.W.2d at 361.
134. 643 S.W.2d 741 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).
135. *Id.* at 744.
136. *Id.* at 742, 744. An E-1 report is the employer's first report of injury. *Id.* at 742. The employer in *Merritt* did not file such a report until Nov. 7, 1978. *Id.*
137. 648 S.W.2d 283 (Tex. 1983).

that France had abandoned the settlement agreement. The court of appeals affirmed the judgment on the ground of election of remedies through acts inconsistent with the assertion of rights under the settlement agreement.[138] The supreme court disagreed with both lower courts, holding that both abandonment of the settlement and election of remedies were affirmative defenses that American Indemnity had not raised in its general denial.[139] In a collateral matter the supreme court reversed the trial court's determination as a matter of law that France was not entitled to attorneys' fees because of failure of "presentment" to the carrier, holding that "[n]o particular form of presentment is required."[140]

Requirement of Pleading Partial Incapacity. The courts of appeal handed down no fewer than four opinions emphasizing the very real pitfall heretofore facing claimants' attorneys in pleading incapacity. Mr. Nations has described the difficulty:

> In cases where a general injury may have caused both total and partial incapacity, the attorneys must be cognizant of the significance of pleading these incapacities alternatively. The Texas Supreme Court decision in *Select Insurance Co. v. Boucher* is illustrative. . . . The clear effect of this holding is that a special issue as to partial incapacity may not be submitted to the jury unless presented as an alternative ground of relief in the injured *worker's* petition. If there is any possibility of any degree of partial incapacity, the well advised claimant's attorneys should plead and prove alternatively for total and partial incapacity.[141]

In *International Insurance Co. v. Archuleta*[142] the supreme court removed much of the danger for claimants' counsel by holding that a "pleading of total incapacity authorizes the submission of issue on partial incapacity."[143] The court of appeals, relying on its understanding of *Select Insurance Co. v. Boucher*,[144] had held the submission to be error.[145] The high court distinguished *Boucher*:

> In *Boucher*, the claimant pleaded and sought recovery for total and permanent disability. Select, the carrier, pleaded and requested issues on partial incapacity. This Court held that defensive issue of partial incapacity is an inferential rebuttal issue and under Rule 277, Tex. R. Civ. P., Select was not entitled to its submission. Submission of disjunctive issues on total incapacity and partial incapacity are appropriate *if two alternative theories of recovery are developed. The issues, as requested by Select, constituted a defense and did not develop an alternative ground of recovery.* Select Ins. Co., this Court held, would have

138. *Id.* at 285. The opinion of the court of appeals was not published.
139. *Id.*
140. *Id.* at 286.
141. Nations, *Pitfalls in Pleading a Workers' Compensation Case for Claimants*, 19 S. TEX. L.J. 415, 425-26 (1978) (footnote omitted; emphasis in original).
142. 27 Tex. Sup. Ct. J. 18 (Oct. 5, 1983).
143. *Id.* at 19.
144. 561 S.W.2d 474 (Tex. 1978).
145. 641 S.W.2d 295, 297 (Tex. App.—El Paso 1982).

> been entitled to a definition of partial incapacity if requested in substantially correct form. The definition, given with the issue on total incapacity, would have preserved the defense.[146]

This holding is formally consistent with the decision in *United States Fire Insurance Co. v. Monn*,[147] where the carrier urged error by the trial court in refusing to submit its proposed definition of partial incapacity where the claimant alleged only total and permanent incapacity. The court of appeals held it proper to refuse the submission where no affirmative written pleading supported it.[148] Thus, a pleading of partial incapacity assures the carrier's ability to obtain at least a definition. Under *Archuleta*, if developed at trial the pleading will entitle the carrier to an issue. On an unrelated point, the court also held that mention of insurance by the claimant's counsel was not necessarily reversible error when the insurer is a named party to the suit.[149]

The continuing wisdom of an alternative pleading of partial incapacity is shown by *Texas Employers' Insurance Association v. Terry*,[150] decided by the same court of appeals that wrote *Archuleta*. The *Terry* court observed:

> Here, the claimant has obtained and retained employment probably at a less strenuous job than he had before the injury and he is able to perform the usual tasks of his employment on a full time basis at a rate of pay in excess of that formerly received, and yet he has been awarded a recovery for total and permanent disability. This was done under a court's charge which presented the jury with no other alternative such as a possible finding of partial disability.[151]

It does not appear that the supreme court's holding in *Archuleta* would alter the *Terry* result. The evidence in *Terry* was factually insufficient to support the jury finding of total and permanent incapacity.

An illustration of the insurer's correct use of the defense of partial incapacity to a claim of total and permanent incapacity appeared in *Texas General Indemnity Co. v. Moreno*.[152] In *Moreno* the appeals court reversed on the trial court's error in refusing a full and correct partial incapacity definition, when the insurer had properly pleaded and proved partial incapacity.[153]

D. Third Party Suits

The Texas Supreme Court settled an important question concerning the role of the immune employer's negligence in a third party negligence ac-

146. 27 Tex. Sup. Ct. J. at 19-20 (emphasis added).
147. 643 S.W.2d 207 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).
148. *Id.* at 208.
149. *Id.* at 209-10.
150. 656 S.W.2d 233 (Tex. App.—El Paso 1983, no writ).
151. *Id.* at 235.
152. 638 S.W.2d 908 (Tex. App.—Houston [1st Dist.] 1982, no writ).
153. *Id.* at 908, 913-14. The court sustained a point of error raising the trial court's failure to include a definition of "earning capacity" in its definition of "partial incapacity." *Id.*

tion, rejecting the holdings of two courts of appeals[154] that the employer's negligence may be submitted to the jury and that the damages attributable to it should be deducted, along with the damages attributable to the plaintiff's own negligence, from the damages found by the jury. The high court in *Varela v. American Petrofina Co.*[155] held that the exclusive remedy provision of the Workers' Compensation Act created an exception to article 2212a, section 2(b) of the comparative negligence statute.[156] The court stated:

> When read together those two Articles indicate the intent of the Legislature that where the third party defendant's negligence is greater than that of the employee, the employee shall recover the total amount of damages as found by the jury diminished only in proportion to the amount of the negligence attributed to the employee.[157]

In a companion case, *Teakell v. Perma Stone Co.*,[158] the court accordingly held that it was proper for the trial court to refuse to submit a special issue to the jury on the employer's negligence.[159]

E. Attorneys' Fees

An attorney was allowed to keep his lump sum fee when a claimant widow whom he represented in a death benefits case died after oral judgment but before the court signed a written judgment. Noting that it is the oral decision that constitutes the judgment of the court, the court of appeals in *Liberty Mutual Insurance Co. v. Woody*[160] also rested its decision on a broader ground, stating:

> It would be a harsh result to deny an attorney his fees for completed services just because his client dies after judgment is rendered rather than after the judgment has either become final or is affirmed. Section 7d does not require such a modification and in the present case the trial court did not abuse its discretion by not doing so. The statute only requires that the benefits accrue for the attorney to be awarded his fees, not that they be enjoyed.[161]

In *Houston General Insurance Co. v. Metcalf*[162] the court had to apportion attorneys' fees in a third party action in which the compensation carrier was actively represented by counsel. The fifth paragraph of article 8307, section 6a covers this situation. It provides for apportionment of an aggregate fee of not more than one-third of the subrogated recovery based

154. Varela v. American Petrofina Co., 644 S.W.2d 903 (Tex. App.—Beaumont), *rev'd*, 658 S.W.2d 561 (Tex. 1983); Perma Stone Co. v. Teakell, 653 S.W.2d 483 (Tex. App.—Corpus Christi), *rev'd*, 658 S.W.2d 563 (Tex. 1983).

155. 658 S.W.2d 561 (Tex. 1983).

156. TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(b) (Vernon Supp. 1984).

157. 658 S.W.2d at 562.

158. 658 S.W.2d 563 (Tex. 1983).

159. *Id.* at 563.

160. 640 S.W.2d 718 (Tex. App.—Houston [1st Dist.] 1982, no writ).

161. *Id.* at 720. TEX. REV. CIV. STAT. ANN. art. 8306, § 7d (Vernon Supp. 1984) provides that an attorney who represents the interest of a claimant from the board in the courts may contract for a fee not to exceed 25% of the recovery, the fee to be fixed by the trial court.

162. 642 S.W.2d 79 (Tex. App.—Tyler 1982, writ ref'd n.r.e.).

upon the benefit to the insurer from each attorney's representation.[163] The court in *Metcalf* approved a division of a one-third fee so as to give two-thirds of the fee to the claimant's counsel and one third to the carrier's counsel. Thus, the carrier's attorney received only a one-ninth fee. The court of appeals sustained the apportionment on points of factual insufficiency and abuse of discretion. The court stated:

> We cannot say that the carrier would have had any recovery absent [claimant's attorney's] efforts. Although appellant's attorney passively refused to accept any lesser settlement on behalf of his client the legal services performed by [claimant's attorney] were instrumental in the carrier having an opportunity to recover any sum. The fact that claimant's counsel initially requested the carrier to accept $20,000 [instead of the $42,715 later actually received] as his part of the total recovery does not diminish the benefits to appellant of [claimant's attorney's] comprehensive services. Parenthetically, considering the time involved, the actual services rendered and the lesser responsibility, an attorney's fee of $4,746 to carrier's counsel does not appear to be inappropriate.[164]

Finally, in *Sunbelt Insurance Co. v. Childress*[165] the court made clear that attorneys' fees are not subject to the statutory discount for present payment announced in article 8306a.[166]

F. Venue in Suits to Set Aside Board Awards

Article 8307, section 5, provides that suits to set aside final rulings or decisions of the board may be brought by either party "in the county where the injury occurred, or in the county where the employee resided at the time the injury occurred . . . ."[167] Thus, when the parties appeal the same board decision to courts in different counties, a race to the courthouse results. It had been predicted that this unsatisfactory situation would be resolved by application of the first-in-time rule.[168] The court in *Andrews v. Utica Mutual Insurance Co.*[169] adopted this unsatisfactory resolution to the situation and stated that the court of first filing obtained dominant jurisdiction.[170]

G. Prejudgment Interest

The court in *Highland Insurance Co. v. Martinez*[171] held that a claimant who brings suit to recover unpaid benefits may receive prejudgment interest only on the portion representing weekly indemnity benefits and not on

163. TEX. REV. CIV. STAT. ANN. art. 8307, § 6a (Vernon Supp. 1984).
164. 642 S.W.2d at 80.
165. 640 S.W.2d 356 (Tex. App.—Tyler 1982, no writ).
166. *Id.* at 361; *see* TEX. REV. CIV. STAT. ANN. art. 8306a (Vernon 1967).
167. TEX. REV. CIV. STAT. ANN. art. 8307, § 5 (Vernon Supp. 1984).
168. *See* F. SOUTHERS & T. KORIOTH, TEXAS WORKERS' COMPENSATION DESK BOOK 183 (1980).
169. 647 S.W.2d 22 (Tex. App.—Houston [1st Dist.] 1982, writ dism'd w.o.j.).
170. *Id.* at 25-26.
171. 638 S.W.2d 507 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

the portion representing recovery for medical expenses.[172] The court relied on the language of the article 8306a proviso providing for four percent interest "where suits are legally brought . . . and recovery is had for past due *weekly* installments . . . ."[173]

III. LEGISLATIVE CHANGES

The Sixty-Eighth Legislature enacted bills amending the Workers' Compensation Act in many particulars. The revisions are summarized below.

A. Benefits and Attorneys' Fees

Funeral Benefits. The legislature increased allowable funeral benefits to $2500.[174]

Death Benefits. Three legislative changes affect death benefits. One clarifies a situation that could arise under former article 8306, section 8b.[175] The preamendment provision provided that disability benefits paid to a claimant during life should be deducted from any death benefit paid to his beneficiaries, should death result from the compensable injury.[176] The amendment makes it clear that this offset operates only in the case of beneficiaries entitled to 360 weeks of benefits and not to beneficiaries entitled to lifetime death benefits, namely spouses.[177]

The legislature also addressed the significant conflict between the facially different standards for the award of lump sum death benefits in former article 8306, section 15[178] and in article 8306, sections 8(b) and 8(d).[179] The amendment makes clear that sections 8(b) and 8(d) are restrictions on the board's power to award lump sum death benefits for "manifest hardship" under section 15.[180]

In a significant change affecting the award of attorneys' fees in death cases, the legislature clarified the definition of a "contested case." The amendment indicates that a case is "contested," thereby triggering the availability of attorneys' fees in a death case, if the carrier fails to admit liability prior to final board action.[181]

B. Penalties for Late Payment of Benefits

In a major modification of the statutory framework, the legislature has created a timetable for commencement or suspension of benefits and has

172. *Id.* at 510-11.
173. TEX. REV. CIV. STAT. ANN. art. 8306a (Vernon 1967) (emphasis added).
174. *Id.* art. 8306, § 9 (Vernon Supp. 1984).
175. *Id.* § 8b (Vernon 1967).
176. *Id.*
177. *Id.* § 8b (Vernon Supp. 1984).
178. *Id.* § 15 (Vernon 1967).
179. *Id.* § 8(b), (d) (Vernon Supp. 1984).
180. *Id.* § 15(b).
181. *Id.* § 8.

added fines and penalties for failure to comply with the timetable.[182] In addition, the 1983 amendments provide for penalties against insurers who "as a general business practice" delay or suspend payment of benefits.[183] Specifically, the legislature added a new section 18a to article 8306. It requires that insurers and self-insurers either commence payments within twenty days of receipt of notice of injury or "file with the Board a statement of controversion, or in claims of fatal benefits, a statement of position."[184] A penalty attaches for failure to meet this new requirement:

> If the association or self-insured fails to initiate weekly indemnity compensation or file a statement of controversion or statement of position within the allotted time, the Board shall notify the association or self-insured in writing to its designated Austin Industrial Accident Board representative of its possible violation of the Workers' Compensation Act. If within 10 days of receipt of such Board notice the association or self-insured has still failed to either commence the payment of weekly indemnity benefits or to file a statement of controversion or in claims for fatal benefits, a statement of position, the Board shall promptly set such claim for a prehearing conference on the merits and thereafter the Board after notice and hearing thereon, by majority vote, may assess a penalty not to exceed 15 percent of the weekly indemnity compensation then past due.[185]

A similar provision applies to suspension of weekly benefits or medical benefits, leading again to the possibility of a fifteen percent penalty.[186] The amended Act provides for attorneys' fees "as allowed by the Act,"[187] which presumably entitles the attorney to twenty-five percent of the fifteen percent penalty. Larger penalties attach to conduct that the board finds to be "a general business practice" of resisting lawful claims:

> If it appears to the Board that the association, or self-insured, may be, as a general business practice, controverting claims by reason of its failure to promptly and adequately investigate such claims, or is controverting claims when the evidence then available clearly indicates compensability, or is suspending the payment of weekly indemnity compensation or medical benefits without stating fully in writing the reasons therefore, the Board, after notice and hearing, may, upon a finding by a majority of the members of the Board . . . , issue [a cease and desist order] or may fine the association or self-insured an amount not to exceed $10,000 or both.[188]

Appeals are de novo as in other cases.[189] In the "general business practice" penalty case, venue for the appeal lies solely in Travis County.[190]

A bill addressing disputes under a compromise settlement agreement

182. *Id.* § 18a.
183. *Id.* § 18a(d).
184. *Id.* § 18a(a).
185. *Id.*
186. *Id.* § 18a(b).
187. *Id.* § 18a(c).
188. *Id.* § 18a(d).
189. *Id.* § 18a(e).
190. *Id.*

was also enacted.[191] It provides that all disputes as to medical benefits under compromise settlement agreements or agreed judgments "shall be first presented by any party to the Industrial Accident Board within six months from the time such dispute has arisen . . . ."[192] The provision expressly includes an exception for "good cause" and defines "dispute" as occurring "when a written refusal of payment has been filed with the board."[193] In addition, the bill places a limitation period of four years from the agreed expiration date upon a carrier's obligations for future medical benefits under a compromise settlement agreement or agreed judgment.[194]

C. Assignment of Benefits to Health Insurers

The exclusive remedy provision of the Act has been amended to allow an assignment in favor of a health insurer who has paid compensable benefits.[195] The Act now provides:

> In the event the association denies liability in a claim and an accident or health insurance company provides benefits to the employee for medical aid, hospital services, nursing services or medicine, then the right to recover such amount may be assigned by the employee to the health or accident insurance company.[196]

D. Notice of Injury and Limitations

In a significant change, the legislature has extended the time limit for filing a claim for compensation from six months to one year.[197]

E. Industrial Accident Board

A lengthy senate bill made numerous changes affecting the board.[198] The amendment's first section contains nondiscrimination provisions, makes the board subject to the Sunset Act,[199] seeks to assure neutrality of board members, makes the board subject to the Open Meetings Act[200] (except for prehearing conferences and hearings and determinations on claims), and strengthens the board's enforcement powers over subscribers who fail to make discovery.[201] Section two of the amending act mandates the establishment by the board of internal procedures for promotion, merit pay increases, and the assurance of nondiscrimination and equal opportunity.[202] In its third section the amendment clarifies the requirement of no-

191. Act. of June 19, 1983, ch. 501, 1983 Tex. Gen. Laws 2934.
192. TEX. REV. CIV. STAT. ANN. art. 8307, § 12b (Vernon Supp. 1984).
193. *Id.*
194. *Id.*
195. Act of May 17, 1983, ch. 131, § 1, 1983 Tex. Gen. Laws 613, 614.
196. TEX. REV. CIV. STAT. ANN. art. 8306, § 3(c) (Vernon Supp. 1984).
197. *Id.* art. 8307, § 4a.
198. Act of June 19, 1983, ch. 483, 1983 Tex. Gen. Laws 2815.
199. TEX. REV. CIV. STAT. ANN. art. 5429k (Vernon Supp. 1984).
200. *Id.* art. 6252—17.
201. *Id.* art. 8307, § 1a, 2, 4b.
202. *Id.* § 3a.

tice to the board upon a subscriber's election of coverage and adds a requirement of notification of a subscriber's change of address.[203] The Act now backs up these notice requirements with the possibility of a five hundred dollar fine.[204]

Finally, the bill's sixth section has amended the Act's treatment of medical services in two particulars. First, it makes clear that the carrier must pay the cost of the medical reports that it requests and that the Act requires to be furnished to the carrier.[205] The cost must be "fair and reasonable" and no additional charge may be made for the provision of a copy to the claimant or his attorney.[206] Second, the new law empowers the board to create voluntary arbitration panels comprised of representatives of provider groups and the insurance industry to aid it in the regulation of compensable medical charges and fees.[207] Panel findings are not admissible into evidence in a trial de novo.[208]

A technical amendment harmonizes the provisions of sections 18a and 20a of article 8308. This amendment clarifies that the failure of an insurer to give notice of cancellation or nonrenewal of subscriber coverage extends the coverage until the cancelling carrier gives such notice pursuant to section 20a or until another carrier gives notice of new coverage under section 18a.[209]

F. Subcontractors

The Sixty-Eighth Legislature has worked a considerable expansion of the "statutory employer" provision of the Act.[210] Under prior law, a general contractor's liability for compensation to its subcontractor's injured employees was limited. The general contractor became the "statutory employer" of the subcontractor's employees only if the general contractor "with the purpose and intention of avoiding [compensation liability] sublets the whole or any part of [his work] to any sub-contractor . . . ."[211] Under the new statute, the general contractor becomes the "statutory employer" of a subcontractor's employees if he agrees to do so in writing and pays the compensation premiums himself.[212] Although the current statute states merely that "the subcontractor and his employees shall be considered employees of the prime contractor only for purpose of the workers' compensation laws . . . and for no other purpose,"[213] it is possible to infer

203. *Id.* art. 8308, § 18a.
204. *Id.* § 18a(b).
205. *Id.* art. 8306, § 7. The Act provides: "The failure of the physician or chiropractor to make such reports or of the hospital to furnish requested records shall relieve the association and the injured worker from any obligation to pay for the services rendered . . . ." *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* art. 8308, § 20a.
210. *Id.* art. 8307, § 6 (Vernon 1967).
211. *Id.*
212. *Id.* § 6(a) (Vernon Supp. 1984).
213. *Id.*

that the legislature thereby conferred upon the prime contractor the tort immunity created by article 8306, section 3.[214]

G. Coverage

The legislature extended state employee coverage to district probation department personnel.[215] Another enactment permits a political subdivision to elect workers' compensation coverage for delinquent children rendering personal services under the restitution program established under section 54.041 of the Family Code.[216] Finally, the extraterritorial provision of the state employee workers' compensation act was amended to make it clear that neither place of hiring nor performance of duties within the state is determinative of state employee coverage under the Act.[217]

H. Second Injury Fund

An amendment has removed the monetary limits that formerly determined the obligation of carriers to pay death benefits into the Second Injury Fund.[218]

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214. *Id.* art. 8306, § 3(d) provides:

> If an action for damages on account of injury to or death of an employee of a subscriber is brought by such employee, or by [his] representatives . . . against a person other than a subscriber . . . and if such action results in a judgment against such other person, or results in a settlement by such other person, the subscriber, his agent, servant or employee, shall have no liability to reimburse or hold such other person harmless on such judgment or settlement, nor shall the subscriber, his agent, servant or employee, have any tort or contract liability for damages to such other person . . . , in the absence of a written agreement expressly assuming such liability . . . .

See also 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 72.31-.31a (desk ed. 1983) (majority of cases hold general contractor who is made employer for purposes of compensation statute should have employer immunity from third party suit).

215. TEX. CRIM. PROC. CODE ANN. art. 42.12, § 10 (Vernon Supp. 1984).

216. TEX. REV. CIV. STAT. ANN. art. 8309h, § 1 (Vernon Supp. 1984); *see* TEX. FAM. CODE ANN. art. 54.041 (Vernon Pam. Supp. 1975-1983).

217. TEX. REV. CIV. STAT. ANN. art. 8309g, § 17 (Vernon Supp. 1984).

218. Act of June 19, 1983, ch. 994, § 1, 1983 Tex. Gen. Laws 5389, 5389-90 (codified at TEX. REV. CIV. STAT. ANN. art. 8306, § 12c—2 (Vernon Supp. 1984)).